

THE HONORABLE MARSHA J. PECHMAN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DORAL BANK PUERTO RICO, on Behalf of
Itself and All Others Similarly Situated,

Plaintiff,

vs.

WASHINGTON MUTUAL ASSET
ACCEPTANCE CORPORATION, et al.,

Defendants.

No. 2:09-cv-01557-MJP

CLASS ACTION

GREATER PENNSYLVANIA
CARPENTERS PENSION FUND'S
MEMORANDUM OF LAW IN FURTHER
SUPPORT OF ITS MOTION FOR
APPOINTMENT AS LEAD PLAINTIFF
AND IN OPPOSITION TO THE
COMPETING MOTION

NOTE ON MOTION CALENDAR:
March 18, 2010 at 10:00 a.m.

HEARING/ORAL ARGUMENT

GREATER PENNSYLVANIA CARPENTERS
PENSION FUND'S MEMORANDUM OF LAW IN
FURTHER SUPPORT OF ITS MOTION FOR
APPOINTMENT AS LEAD PLAINTIFF AND IN
OPPOSITION TO THE COMPETING MOTION
(2:09-cv-01557-MJP)

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TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. ARGUMENT	4
A. Doral Bank Should Not Be Appointed as Lead Plaintiff	4
1. Doral Bank Does Not Satisfy the Requirements of Rule 23 and Has Not Triggered the PSLRA’s “Most Adequate Plaintiff” Presumption	4
2. Doral Bank Suffers from Debilitating Conflicts of Interest Which Preclude Its Appointment	7
B. Greater Pennsylvania Is the “Most Adequate Plaintiff” and Should Be Appointed Lead Plaintiff.....	8
III. CONCLUSION.....	9

1 Class member and proposed lead plaintiff Greater Pennsylvania Carpenters Pension Fund
2 (“Movant” or “Greater Pennsylvania”) respectfully submits this memorandum of law in further
3 support of its motion for appointment as lead plaintiff pursuant to the Private Securities Litigation
4 Reform Act of 1995 (“PSLRA”) in the above-referenced action, and in opposition to the competing
5 motion submitted by Doral Bank Puerto Rico (“Doral Bank”).

6 **I. INTRODUCTION**

7 Presently pending before this Court are two motions for appointment as lead plaintiff and
8 approval of lead plaintiff’s selection of counsel. In addition to Greater Pennsylvania’s motion, Doral
9 Bank has filed a motion seeking appointment as lead plaintiff.¹

10 Pursuant to the PSLRA, the Court is instructed to appoint as lead plaintiff the person or
11 persons with the largest financial interest in the outcome of the litigation that otherwise satisfy the
12 requirements of Federal Rule of Civil Procedure 23 (“Rule 23”). The PSLRA also requires the Court
13 to appoint only those applicants that can fairly and adequately represent the class and are not subject
14 to unique defenses. 15 U.S.C. §77z-1(a)(3)(B)(iii)(II); *In re Cavanaugh*, 306 F.3d 726, 732 (9th Cir.
15 2002). Specifically, the PSLRA provides that, in determining the “most adequate plaintiff”:

16 [T]he court shall adopt a presumption that the most adequate plaintiff in any private
17 action arising under this chapter is the person or group of persons that –

18 (aa) has either filed the complaint or made a motion in response to a
19 notice . . . ;

20 ¹ Doral Bank is the principle banking entity of Doral Financial Corporation (“Doral Financial”) (collectively,
21 with Doral Bank, “Doral”). Through Doral Bank and Doral Bank’s wholly-owned subsidiary Doral Mortgage, Doral
22 Financial accepts deposits from the general public and institutions, obtains borrowings, originates and invests in loans
23 (primarily residential real estate mortgage loans), invests in mortgage-backed securities as well as in other investment
24 securities, and offers traditional banking services. Approximately 93% of Doral Bank’s loan portfolio is secured by real
25 estate and, like Washington Mutual, Doral Bank’s residential mortgage loans, which are supplemented by wholesale loan
purchasers from third parties, are securitized and sold on the secondary market. *See* Declaration of Brian O. O’Mara in
Support of Greater Pennsylvania Carpenters Pension Fund’s Memorandum of Law in Further Support of Its Motion for
Appointment as Lead Plaintiff and in Opposition to the Competing Motion (“O’Mara Decl.”), Ex. 1 (Doral Fin. Corp.
Form 10-K for the year ended December 31, 2009, Part I) at 3-4.

(bb) in the determination of the court, has the largest financial interest in the relief sought by the class; **and**

(cc) ***otherwise satisfies the requirements of Rule 23*** of the Federal Rules of Civil Procedure.

15 U.S.C. 77z-1(a)(3)(B)(iii).² See Notice of Motion and Memorandum of Law in Support of Appointment of Doral Bank Puerto Rico as Lead Plaintiff and Approval of Its Selection of Lead Counsel (“Doral Mem.”) (Docket #27) at 2 (recognizing that before being appointed as lead plaintiff, movant must “satisfy the typicality and adequacy requirements of Federal Rule of Civil Procedure 23”).

If the Court were to solely consider the movants’ claimed “financial interest,” Doral Bank would appear well-positioned to argue it should be presumed to be the “most adequate plaintiff.” However, the PSLRA “does not permit courts simply to ‘presume’ that the movant with ‘the largest financial interest in the relief sought by the class’ satisfies the typicality and adequacy requirements.” *In re Cendant Corp. Litig.*, 264 F.3d 201, 264 (3d Cir. 2001). “[A] movant’s financial interest is just a beginning point, and courts acknowledge that they must also consider the movant’s ability and willingness to adequately represent the class.” *In re Cable & Wireless, PLC, Sec. Litig.*, 217 F.R.D. 372, 377 (E.D. Va. 2003); see *In re Royal Ahold N.V. Sec. & ERISA Litig.*, 219 F.R.D. 343 (D. Md. 2003) (reasoning that lead plaintiff will be determined on factors other than financial interest).

Here, Doral Bank fails to satisfy Rule 23’s typicality and adequacy requirements and should not be appointed lead plaintiff. Not only is Doral Bank an “insider” in the subprime mortgage and securitization markets (as it was in 2007 when the WaMu Certificates were issued, see, e.g., Docket #18, ¶1), but Doral itself has been the target of numerous investigations centered on its own improper subprime mortgage and accounting practices which are similar to those at issue here.

² Unless otherwise noted, all emphasis is added and citations are omitted.

1 *Infra*, §II.A.1. In fact, Doral’s treasurer, Mario S. Levis, was indicted on securities fraud and wire
2 fraud charges relating to his role in allegedly manipulating the Company’s accounting related to
3 Doral’s own mortgage pass-through securities. *Id.* Compounding these problems and highlighting
4 Doral Bank’s inability to “otherwise satisfy[y] the requirement of Rule 23,” several Doral senior
5 insiders, including former Doral director Frank W. Baier and current Doral treasurer Marangal I.
6 Domingo, are former Washington Mutual executives and potential fact witnesses in this case.³ *Infra*,
7 §II.A.2. At a minimum, these defects and conflicts render Doral Bank “subject to” unique defenses
8 which may prove prejudicial to the class and would most assuredly be exploited by capable defense
9 counsel to the detriment of the class if Doral was appointed lead plaintiff. *See In re Bally Total*
10 *Fitness Sec. Litig.*, No. 04 C 3530, 2005 U.S. Dist. LEXIS 6243, at *19 (N.D. Ill. Mar. 15, 2005)
11 (“the PSLRA . . . provides that we ask simply whether [a movant] is likely to be ‘subject to’ [unique
12 defenses] . . . [not that] the defense is likely to succeed”).

13 By contrast, Greater Pennsylvania – a pension fund overseen by a board of trustees
14 experienced in PSLRA actions – has the largest financial interest in the relief sought by the class of
15 any movant which “otherwise satisfies the requirements of Rule 23.” 15 U.S.C. §77z-
16 1(a)(3)(B)(iii)(I)(cc). And, unlike Doral, Greater Pennsylvania has not been linked to misconduct
17 similar to that which the class alleges Washington Mutual engaged. Nor will Greater Pennsylvania
18 burden the class with a representative which is subject to unique defenses. In the end, Greater
19 Pennsylvania is the most adequate plaintiff and should be appointed Lead Plaintiff. Doral Bank’s
20 motion should be denied.

21
22
23 ³ As a former Washington Mutual insider, Mr. Baier is likely to have had access to insider information as well as
24 confidential and/or proprietary information. *See In re Michaels Stores, Inc. Sec. Litig.*, No. 3:03-CV-0246-M, slip. op at
25 4 (N.D. Tex. Oct. 24, 2003) (finding that the movant with the largest financial interest – a former employee who had
access to defendant’s non-public information – was subject to unique defenses and therefore not appropriately appointed
to represent the class). O’Mara Decl., Ex. 2.

1 **II. ARGUMENT**

2 The PSLRA directs courts to appoint as lead plaintiff the movant which is “most capable of
3 adequately representing the interests of class members.” 15 U.S.C. §78u-4(a)(3)(B)(i). Courts have
4 an “obligation to appoint as lead plaintiff the member or members of the purported plaintiff class
5 who are “most capable of representing the interests of the class members.”” *Pirelli Armstrong Tire*
6 *Corp. Retiree Med. Benefits v. LaBranche & Co.*, 229 F.R.D. 395, 407 (S.D.N.Y. 2001). *See*
7 *Vincelli v. Nat’l Home Health Care Corp.*, 112 F. Supp. 2d 1309, 1313 (M.D. Fla. 2000) (“the
8 PSLRA provides certain guidelines for identifying the plaintiff or plaintiffs who are the most
9 strongly aligned with the class of shareholders”). The “‘most capable’ plaintiff – and hence the lead
10 plaintiff – is the one who has the greatest financial stake in the outcome of the case,” but only “*so*
11 *long as* he meets the requirements of Rule 23.” *Cavanaugh*, 306 F.3d at 729; *Cendant*, 264 F.3d
12 201; 15 U.S.C. §77z-1(a)(3)(B)(iii)(I). “If (*for any reason*) the court determines that the movant
13 with the largest losses cannot make a threshold showing of typicality or adequacy, then the court
14 should . . . disqualify that movant from serving as lead plaintiff.” *Cendant*, 264 F.3d at 267;
15 *Cavanaugh*, 306 F.3d at 730. *See, e.g., Baydale v. Am. Express Co.*, No. 09 Civ. 3016 (WHP) 2009
16 U.S. Dist. LEXIS 71668 (S.D.N.Y. Aug. 14, 2009) (appointing pension fund with a financial interest
17 equal to just 5% of the loss suffered by the largest movant where court found that largest movant
18 was subject to unique defenses).

19 **A. Doral Bank Should Not Be Appointed as Lead Plaintiff**

20 **1. Doral Bank Does Not Satisfy the Requirements of Rule 23 and**
21 **Has Not Triggered the PSLRA’s “Most Adequate Plaintiff”**
22 **Presumption**

23 While Doral may claim a larger financial interest in the relief sought by the class, it cannot be
24 appointed as a lead plaintiff because it does not satisfy Rule 23’s typicality and adequacy
25 requirements. Indeed, Doral Bank is subject to a variety of adequacy challenges as it has been

1 embroiled in a subprime mortgage scandal of its own which in turn resulted in federal investigations,
2 private shareholder actions and individual criminal indictments.

3 Doral was itself alleged to have engaged in mortgage-related abuses similar to what is
4 alleged here. *See, e.g., In re Doral Fin. Corp. Sec. Litig.*, No. 1:05-md-01706, Docket #55
5 (S.D.N.Y. June 22, 2006) (amended securities fraud complaint for violations of the Securities
6 Exchange Act of 1934 based, in part, on Doral's concealment of losses stemming from the sale of
7 more than \$4 billion of fixed rate non-conforming mortgages);⁴ *see also* Declaration of Douglas C.
8 McDermott in Support of Greater Pennsylvania Carpenters Pension Fund's Motion for Appointment
9 as Lead Plaintiff, and Approval of Selection of Counsel ("McDermott Decl.") (Docket #30), Ex. C
10 (discussing FBI investigation of Doral for subprime mortgage fraud). According to the complaint in
11 the civil action against Doral, the Company was alleged to have engaged in a massive accounting
12 fraud related to its mortgage loan and securitization practices which caused it to overstate the
13 Company's pre-tax income by more than \$920.8 million and understate its debt by more than \$3.3
14 billion. *E.g., Doral*, No. 1:05-md-01706, Docket #55, ¶3.

15 As a result of misconduct relating to the valuation of its mortgage-related securities and the
16 sale of mortgage loans to third-party financial institutions, Doral was forced to enter into consent
17 orders with the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance
18 Corporation and the Commissioner of Financial Institutions of Puerto Rico. *See O'Mara Decl., Exs.*
19 *3-4.* Moreover, Doral's treasurer Mario S. Levis, a/k/a "Sammy Levis," was indicted for securities
20 fraud and wire fraud for his role in Doral's dissemination of false and misleading statements
21 concerning mortgage pass-through certificates. *United States v. Levis*, No. S1 08 Cr. 181 (TGP)
22 (S.D.N.Y. Feb. 18, 2010); *see O'Mara Decl., Exs. 5-6.* Mr. Levis' criminal fraud trial is scheduled
23

24
25 ⁴ This civil action was ultimately settled.

1 to begin on March 22, 2010, in the Courtroom of the Honorable Thomas P. Griesa in the United
2 States District Court for the Southern District of New York.

3 While there is no bright line rule to determine whether a proposed lead plaintiff should be
4 subject to the type of adequacy challenges which preclude it from serving as a fiduciary for the class,
5 courts have found that movants subject to attack in prior deceptive conduct should not be appointed
6 lead plaintiff. *See, e.g., In re Surebeam Corp. Sec. Litig.*, No. 03 CV 1721 JM (POR), 2003 U.S.
7 Dist. LEXIS 25022, at *21-*22 (S.D. Cal. Dec. 31, 2003) (refusing to appoint lead plaintiff movant
8 where representative of movant was the subject of numerous complaints to securities regulators);
9 *Newman v. Eagle Bldg. Techs.*, 209 F.R.D. 499, 504-05 (S.D. Fla. 2002) (rejecting lead plaintiff
10 movant which received two public citations for violations of SEC and NASD rules because of
11 concerns about potential defenses and movant's moral character); *In re Network Assocs. Sec. Litig.*,
12 76 F. Supp. 2d 1017, 1029 (N.D. Cal. 1999) (declining to appoint an institution as lead plaintiff
13 because two of its affiliates were under investigation for fraud).

14 To be sure, the movant claiming the largest financial stake in the outcome of the case can be
15 appointed lead plaintiff, only "so long as he meets the requirements of Rule 23." *Cavanaugh*, 306
16 F.3d at 729. District courts in the Ninth Circuit have addressed this very issue, including Judge
17 Jeffrey T. Miller, who in *Surebeam* noted that Sherwin Brown, a principle of lead plaintiff movant
18 Jamerica, had been "subject to over sixty complaints to securities regulators including
19 misrepresentation, unauthorized trading in client accounts, and use of unsuitable investments." 2003
20 U.S. Dist. LEXIS 25022, at *21. Recognizing that it is "unclear . . . whether these accusations
21 involve Surebeam securities or bear any relation to the present action," the court still found "that
22 Jamerica is incapable of serving as lead plaintiff." *Id.* The *Surebeam* court held that "[w]ithout
23 comment or consideration of Mr. Brown's guilt or innocence as to the underlying charges, this court
24 finds that *there is at least a potential that Jamerica will be subject to unique defenses and will not*
25 *fairly and adequately protect the interests of the class.*" *Id.*

1 In *Network Associates*, Judge William Alsup evaluated the propriety of appointing as lead
2 plaintiff a movant who had been the subject of criminal fraud investigations. 76 F. Supp. 2d at 1029.
3 There, the court rejected the movant with the largest financial interest, finding that, even if evidence
4 of the movant's misconduct were excluded at trial, the court was "*unwilling to install an enterprise*
5 *under such a cloud in a position of trust and confidence.*" *Id.*; see also *LaBranche*, 229 F.R.D. at
6 416 ("[H]onesty and trustworthiness are relevant factors in assessing a candidate's ability to serve as
7 an adequate fiduciary for a class"); *In re Safeguard Scientifics*, 216 F.R.D. 577, 582 (E.D. Pa.
8 2003) (denying a motion for class certification because "serious concerns with credibility leave Lead
9 Plaintiff vulnerable to further attacks that would impose an unnecessary disadvantage on the class").

10 Like the movants rejected in *Surebeam* and *Network Associates*, Doral Bank too is subject to
11 adequacy attacks and cannot satisfy the requirements of Rule 23. Doral and its senior executives
12 have been alleged to have engaged in mortgage-related misconduct, the Company was forced to
13 enter into various consent orders with regulators, and a former senior executive is currently awaiting
14 trial on criminal fraud charges for his role in the misconduct. Like the courts in *Surebeam* and
15 *Network Associates* which refused to appoint as lead plaintiff the movant with the largest financial
16 interest because of potential adequacy defects, this Court too should deny Doral's motion.

17 **2. Doral Bank Suffers from Debilitating Conflicts of Interest**
18 **Which Preclude Its Appointment**

19 Washington Mutual and Doral have employed several of the same senior executives and
20 directors. This subjects Doral to additional unique defenses and creates conflicts which also
21 preclude its appointment as lead plaintiff.⁵ For example, Frank W. Baier was a member of Doral's
22 Board of Directors from July 2007 through September 2008, when he left to concentrate on his role

23
24 ⁵ Perhaps these defects provide explanation for Doral Bank's failure to comply with the PSLRA's notice
25 requirements, 15 U.S.C. §77z-1(a)(3)(A), and willingness to join the related 2006 action and cede control of this action
to the lead plaintiff and its counsel in the 2006 action. O'Mara Decl., Ex. 9.

1 as Special Advisor to Washington Mutual’s President and Chief Executive Officer. O’Mara Decl.,
2 Ex. 7. In May 2009, after spending 2008 in the upper echelon of Washington Mutual’s decision
3 making apparatus, Doral’s Board of Directors re-appointed Mr. Baier to serve as a Doral director.
4 O’Mara Decl., Ex. 8. Similarly, Doral’s treasurer during the relevant period and former CFO
5 (Marangal I. Domingo) is the former Washington Mutual treasurer and served as an executive vice
6 president for finance and strategy for Countrywide’s banking subsidiary. *See, e.g.,* McDermott
7 Decl., Ex. D (discussing recruitment of former Washington Mutual and Countrywide treasurer to
8 serve as Doral treasurer).

9 The class should not be burdened with having a lead plaintiff which has this web of
10 interconnected relationships, the existence of which only further subjects Doral Bank to unique
11 defenses. *See Bally*, 2005 U.S. Dist. LEXIS 6243, at *19 (“the PSLRA . . . provides that we ask
12 simply whether [a movant] is *likely to be ‘subject to’* [unique defenses] . . . [not that] the defense is
13 likely to succeed”); *In re Enron Corp., Sec. Litig.*, 206 F.R.D. 427, 455-56 (S.D. Tex. 2002)
14 (declining to appoint lead plaintiff whose potential defenses and conflicts *could* endanger the
15 interests of the rest of the class); *see also Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce,*
16 *Fenner & Smith, Inc.*, 903 F.2d 176, 180 (2d Cir. 1990) (“Regardless of whether the issue is framed
17 in terms of the typicality . . . or the adequacy of its representation . . . there is a danger that absent
18 class members will suffer if their representative is preoccupied with defenses unique to it.”). For this
19 additional reason, Doral Bank should not be appointed as lead plaintiff.

20 **B. Greater Pennsylvania Is the “Most Adequate Plaintiff” and Should Be**
21 **Appointed Lead Plaintiff**

22 There can be no question that Greater Pennsylvania *prima facie* satisfies the requirements of
23 Rule 23 and is the movant most capable of adequately representing the interests of the class. *See,*
24 *e.g.,* Greater Pennsylvania Carpenters Pension Fund’s Motion for Appointment as Lead Plaintiff, and
25 Approval of Selection of Counsel (Docket #29) at §III.A.2.b. Greater Pennsylvania is a
26 sophisticated pension fund overseen by a board of trustees. It has a record of successfully
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1 prosecuting shareholder actions and is accustomed to acting as a fiduciary and directing outside
2 lawyers. *See, e.g.*, McDermott Decl., Ex. B (Certification). Greater Pennsylvania is committed to
3 actively overseeing counsel and vigorously prosecuting this case to a successful conclusion for the
4 benefit of the class. To this end, Greater Pennsylvania has selected and retained competent counsel
5 to represent them and the class. *See* McDermott Decl., Ex. E.

6 In the end, only Greater Pennsylvania has made the required threshold Rule 23 showing and
7 it alone is the presumptively “most adequate plaintiff.” Greater Pennsylvania should be appointed as
8 lead plaintiff.

9 **III. CONCLUSION**

10 Doral Bank has failed to meet its burden by making a threshold showing of typicality or
11 adequacy. It is subject to unique defenses which prevent it from meeting the PSLRA’s Rule 23
12 adequacy and typicality requirements. Greater Pennsylvania respectfully submits that its motion
13 should be granted, and Doral’s competing motion denied.

14 DATED: March 8, 2010

Respectfully submitted,

15 COUGHLIN STOIA GELLER
16 RUDMAN & ROBBINS LLP
17 DARREN J. ROBBINS
SCOTT H. SAHAM
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1 CERTIFICATE OF SERVICE

2 I hereby certify that on March 8, 2010, I electronically filed the foregoing with the Clerk of
3 the Court using the CM/ECF system which will send notification of such filing to the e-mail
4 addresses denoted on the attached Electronic Mail Notice List, and I hereby certify that I have
5 mailed the foregoing document or paper via the United States Postal Service to the non-CM/ECF
6 participants indicated on the attached Manual Notice List.

7 I certify under penalty of perjury under the laws of the United States of America that the
8 foregoing is true and correct. Executed on March 8, 2010.

9 s/ BRIAN O. O'MARA

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- (No manual recipients)